(1)
Supreme Court, U.S.
FILED
96 693 NOV 1 1996
No. 96
OFFICE OF THE CLERK

In The

Supreme Court of the United States

October Term, 1996

MOHAMMED MIZANI, a/k/a JOHN MARJANI,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Third Circuit

PETITION FOR WRIT OF CERTIORARI

ELIZABETH K. AINSLIE
Counsel of Record
Attorney for Petitioner
Mohammed Mizani

AINSLIE & BRONSON
1101 Market Street, Suite 2630
Philadelphia, PA 19107
(215) 574-0800

COCKLE LAW BRIEF PRINTING CO., (800) 225-6964
OR CALL COLLECT (402) 342-2831

27pp

QUESTIONS PRESENTED

1. What sort of "fair and just reason", other than an outright violation of *Boykin v. Alabama*, 395 U.S. 238 (1969) or Federal Rule of Criminal Procedure 11, must be shown under Rule 32(e) of the Federal Rules of Criminal Procedure in order to permit a criminal defendant to withdraw his guilty plea before sentencing?

2. Did the refusal to allow petitioner to withdraw his guilty plea, despite his presentation of a fair and just reason, deprive him of due process under the Fifth Amendment?

TABLE OF CONTENTS

Page

QUESTIONS PRESENTED i

OPINIONS BELOW 1

JURISDICTION 1

CONSTITUTIONAL PROVISIONS AND CRIMINAL RULES INVOLVED 1

STATEMENT OF THE CASE 2

REASON FOR GRANTING THE WRIT 4

MOST FEDERAL CRIMINAL CASES TODAY ARE DISPOSED OF BY GUILTY PLEA, YET THIS COURT HAS NEVER IDENTIFIED THE CIRCUMSTANCES UNDER WHICH A GUILTY PLEA MAY BE WITHDRAWN. IN THE EXERCISE OF ITS SUPERVISORY POWERS, THIS COURT SHOULD EXPLICATE THE FEDERAL RULE PERMITTING WITHDRAWAL FOR "ANY FAIR AND JUST REASON." PETITIONER'S DUE PROCESS RIGHTS WERE ALSO ABRIDGED WHEN HE WAS HELD TO A WAIVER OF A JURY TRIAL MADE AT A TIME WHEN HE WAS INCAPABLE OF UNDERSTANDING THE RAMIFICATIONS OF HIS PLEA 4

CONCLUSION 6

TABLE OF AUTHORITIES

Page

CASES:

Boykin v. Alabama, 395 U.S. 238, 89 S.Ct. 1709 (1969) 5

United States v. Jones, 979 F.2d 316 (3d Cir. 1992) 5

CONSTITUTION AND STATUTES:

28 U.S.C. § 1254(1) 1

U.S. CONST. amend V 1

RULES:

F.R.CRIM.P. 11 5

F.R.CRIM.P. 32(e) 2, 4

PETITION FOR WRIT OF CERTIORARI

Petitioner, Mohammed Mizani, respectfully prays that a Writ of Certiorari issue to review the judgment of the United States Court of Appeals for the Third Circuit entered on August 8, 1996.

OPINIONS BELOW

The Memorandum Opinion of the United States Court of Appeals for the Third Circuit was filed on August 8, 1996. The Opinion and Order denying Defendant's Motion To Withdraw Guilty Plea was dated December 19, 1995 and filed on December 22, 1995. Both Opinions are unreported.

JURISDICTION

The jurisdiction of this Court is invoked pursuant to 28 U.S.C. § 1254(1).

CONSTITUTIONAL PROVISIONS AND CRIMINAL RULES INVOLVED

The Fifth Amendment to the Constitution of the United States provides in pertinent part:

No person shall be . . . deprived of life, liberty, or property without due process of law. . . .

Rule 32(e) of the Federal Rules of Criminal Procedure provides in pertinent part:

If a motion to withdraw a plea of guilty or nolo contendere is made before sentence is imposed, the Court may permit the plea to be withdrawn if the defendant shows any fair and just reason. At any later time, a plea may be set aside only on direct appeal or by motion under 28 U.S.C. § 2255.

STATEMENT OF THE CASE

Petitioner was indicted on January 29, 1994 and charged with criminal violations of federal environmental laws. On the day he was to go to trial, petitioner pled guilty. In the twenty-minute colloquy, petitioner's participation was limited to yes or no answers to the district court's questions.

A few months later, at the hearing on his motion to withdraw his guilty plea, petitioner's attorney testified that he believed that petitioner, at the time that he entered his guilty plea, did not understand what he was doing because he was "paralyzed by fear". Petitioner's attorney, whose credibility was not challenged by the government, further testified that "in retrospect . . . I think this man was literally incapable of really understanding the ramifications."

A large component of petitioner's fear, according to his counsel, was fear that petitioner would be unable to

explain himself at trial, especially under cross-examination, since the language that petitioner speaks at home and in his business is Farsi.

Both petitioner's attorney and the government agent who testified at the hearing agreed that the prosecution had been a difficult one for the government from the beginning. When the agent was asked "what if any difficulties the government would have preparing this case for trial . . . " if petitioner were permitted to withdraw his plea, the agent said, "I would have to reference the difficulty we have had in preparing for the case previously."

The district judge denied petitioner's motion to withdraw his guilty plea and that same day filed an eight-page written opinion justifying his decision. The opinion did not challenge the credibility of petitioner's former defense counsel, nor did it mention the government agent's concession that the government would experience no greater prejudice if petitioner were permitted to withdraw his plea than it had experienced all along.

The district court's decision, filed on December 22, 1995, was affirmed by the United States Court of Appeals for the Third Circuit on August 8, 1996. This petition followed.

REASON FOR GRANTING THE WRIT

MOST FEDERAL CRIMINAL CASES TODAY ARE DISPOSED OF BY GUILTY PLEA, YET THIS COURT HAS NEVER IDENTIFIED THE CIRCUMSTANCES UNDER WHICH A GUILTY PLEA MAY BE WITHDRAWN. IN THE EXERCISE OF ITS SUPERVISORY POWERS, THIS COURT SHOULD EXPLICATE THE FEDERAL RULE PERMITTING WITHDRAWAL FOR "ANY FAIR AND JUST REASON." HERE, PETITIONER'S DUE PROCESS RIGHTS WERE ABRIDGED WHEN HE WAS HELD TO A WAIVER OF A JURY TRIAL MADE AT A TIME WHEN HE WAS INCAPABLE OF UNDERSTANDING THE RAMIFICATIONS OF HIS PLEA.

Although Rule 32(e) of the Federal Rules of Criminal Procedure provides that criminal defendant may withdraw his guilty plea for "any fair and just reason", busy federal courts in practice almost never permit a defendant to withdraw his guilty plea; certainly the Court of Appeals for the Third Circuit has never in recent memory reversed a district judge's refusal to permit withdrawal of a guilty plea. This Court has never, to the best of our knowledge, given any guidance to the lower federal courts with respect to the kinds of "fair and just" reasons that permit withdrawal of a guilty plea.

This issue implicates this Court's supervisory powers but also, and more importantly, implicates the due process rights of federal criminal defendants. When criminal defendants plead guilty, they necessarily waive their constitutional right to trial by jury, and a waiver of such an important constitutional right should not be virtually irrevocable, as it has become in the federal courts today.

This appeal presents the issue squarely and simply. The district court ignored petitioner's counsel's opinion that at the time of the guilty plea petitioner did not understand the ramifications of the plea; the district judge stated merely that the fact that petitioner may have entered his plea while under physical and emotional stress is not a sufficient reason to permit withdrawal of the plea. Likewise, the district court recited, as evidence of prejudice to the government, factors which were inherent in the prosecution from the beginning, such as witnesses who are homeless and/or addicted to narcotics.

The Court of Appeals for the Third Circuit generated a not-for-publication opinion which perfunctorily applied its previous decision in *United States v. Jones*, 979 F.2d 316, 317 (3d Cir. 1992), to the effect that "a simple shift in defense tactics, a change of mind or the fear of punishment are not adequate reasons to force the government to incur the expense, difficulty and risk of trying a defendant, who had already acknowledged his guilt before the court." The Court of Appeals reiterated its position that a defendant must not only reassert his innocence but give sufficient reasons to explain why contradictory positions were taken before the district court.

Presumably there are some fair and just reasons for a defendant to withdraw his guilty plea, other than an outright violation of the guilty plea colloquy standards set forth in *Boykin v. Alabama*, 395 U.S. 238, 89 S.Ct. 1709 (1969) and Federal Rule of Criminal Procedure 11, but the lower federal courts have not told criminal defendants or their counsel what those reasons may be. Given the quantitative and qualitative importance of guilty pleas to the

federal criminal system of justice, it is time for this Court to do that.

CONCLUSION

For all these reasons, petitioner respectfully requests that his petition for a writ of certiorari to the United States Court of Appeals for the Third Circuit be granted.

Respectfully submitted,

ELIZABETH K. AINSLIE
Attorney for Petitioner
Mohammed Mizani

AINSLIE & BRONSON
1101 Market Street, Suite 2630
Philadelphia, PA 19107
(215) 574-0800

INDEX TO APPENDIX

Page

UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT MEMORANDUM OPINION ... App. 1

UNITED STATES DISTRICT COURT ORDER AND MEMORANDUM ..... App. 8

NOT FOR PUBLICATION

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 96-1118

UNITED STATES OF AMERICA

vs.

MOHAMMED MIZANI,
a/k/a JOHN MARJANI

Mohammed Mizani,

Appellant

Appeal from the United States District Court
for the Eastern District of Pennsylvania
(D.C. Crim. No. 94-cr-00485-1)
District Judge: Honorable Marvin Katz

Submitted Under Third Circuit LAR 34.1(a)
August 5, 1996
Before: MANSMANN, SCIRICA and WEIS, *Circuit Judges.*

(Filed AUG 8 1996)

MEMORANDUM OPINION OF THE COURT

MANSMANN, *Circuit Judge.*

Mohammed Mizani appeals from the district court's denial of his motion to withdraw his guilty plea. On

November 29, 1994, Mizani, with three co-defendants, was indicted by a grand jury and charged in a four-count indictment with violations of the Clean Air Act arising from Mizani's attempts to remove asbestos from a building he owned in Philadelphia. On July 17, 1995, the day that trial was scheduled to begin, Mizani and the government entered into a written plea agreement.[1] Approximately four months later, on November 8, 1995, Mizani filed a motion to withdraw his guilty plea. Following a hearing held on this motion on December 19, 1995, the court denied Mizani's motion and sentenced him to eighteen months of imprisonment.

On appeal to us, Mizani contends that the district court should have permitted him to withdraw his guilty plea. Mizani contends that he pled guilty because he was "paralyzed by fear", fear of an American jury which might not understand or accept his testimony because of his Iranian national origin and fear because of his virtual certainty he would go to jail if convicted. Mizani also had fears concerning his ability to explain his situation to an American jury in English; Mizani was afraid that he would be unable to express himself at trial, especially

---

[1] Pursuant to the terms of this agreement, Mizani agreed to plead guilty to one count of conspiracy to violate the Clear Air Act in violation of 18 U.S.C. § 371, to pay a special assessment of $50 at the time of sentencing, and to make voluntary restitution in the amount of $40,000. In return, the government agreed that at the time of sentencing, it would move to dismiss the remaining counts of the indictment and would recommend that no fine be imposed provided that the voluntary restitution had been made.

under cross-examination. According to Mizani, these fears prevented him from making an intelligent decision.

I.

Federal Rule of Criminal Procedure 32(e) provides, "If a motion to withdraw a plea of guilty or nolo contendere is made before sentence is imposed, the court may permit the plea to be withdrawn if the defendant shows any fair and just reason." In *United States v. Huff*, 873 F.2d 709, 712 (3d Cir. 1989), we identified the factors to be considered in determining whether a defendant has demonstrated a fair and just reason for withdrawing a guilty plea: (1) whether the defendant asserts his innocence; (2) whether the government would be prejudiced if the plea were withdrawn; and (3) the strength of the defendant's reasons for withdrawing his plea. We have made explicit that "there is no absolute right to withdraw a guilty plea and acceptance of the motion is within the discretion of the trial court whose determination will only be disturbed if the court has abused its discretion." *Gov't of Virgin Islands v. Berry*, 631 F.2d 214, 219 (3d Cir. 1980). It is the defendant's burden to establish that there are grounds for withdrawal. *Id.*

II.

Regarding the first *Huff* factor, the defendant's assertion of his innocence, Mizani testified at the hearing on his motion to withdraw his plea that he "didn't do anything" (74a). Nonetheless, this conclusory claim of innocence does not explain why Mizani agreed at his plea colloquy with the government's proffer of the evidence

against him, why Mizani waited approximately four months to raise doubts about his plea, or why Mizani honored the plea agreement by contributing $40,000 to two non-profit organizations in an effort to comply with the agreement. In *United States v. Jones*, 979 F.2d 316, 318 (3d Cir. 1992), we required that a "defendant must . . . not only reassert [his] innocence, but give sufficient reasons to explain why contradictory positions were taken before the district court and why permission should be given to withdraw the guilty plea and reclaim the right to trial." Here, the district court concluded that Mizani's claim of innocence "rings hollow when it was [as] conclusory as it was. . . . And when the Court asked whether the defendant agreed with the government's summary of what he had done[,] . . . [Mizani] answered at page 16, 'Yes, I do.' " (102a). The court in making these findings was acting within its discretion and we cannot say that they are clearly erroneous. *See United States v. Washington*, 341 F.2d 277, 281 (3d Cir.), *cert. denied*, 382 U.S. 850 (1965) (the good faith, credibility and weight of a defendant's assertions in support of a motion for withdrawal of a plea are preeminently issues for the hearing court to decide).

With respect to the second relevant factor, prejudice to the government, we find that the district court did not err in concluding that the government would be prejudiced if Mizani were permitted to withdraw his plea. The government clearly established justifiable concern about its ability to locate and produce witnesses who were either homeless, addicted to crack cocaine, or dead. In addition to the difficulty in locating these witnesses, there was the risk that the memory of a key witness had faded and the likelihood that another key witness was

now hostile to the government because he had been sentenced in the interim.

Finally, in assessing the strength of Mizani's reasons for withdrawing his plea, the trial court concluded that Mizani did not proffer a good and sufficient reason for withdrawing his plea. Although the district court acknowledged Mizani's proffered reason for the plea, fear, the court found that Mizani's fear, understandably, was a fear of sentence, but that Mizani understood the consequence of his guilty plea. Mizani is fluent in English due to his education in the United States and his extensive commercial dealings conducted here. These findings also are not clearly erroneous.

In sum, the district court concluded that there was no untoward pressure on Mizani to enter his guilty plea. (100a). Rather, the court found that Mizani had evaluated the strengths and weaknesses of the government's case with his counsel prior to Mizani's plea colloquy and that Mizani had made a decision, based upon an understanding of the risks of going to trial. The district court determined that Mizani was experiencing a change of mind, based upon consultation with other lawyers and his fear of sentence. (100a). The district court declined to permit Mizani to withdraw his plea relying upon our decision in *United States v. Jones, supra,* that "a simple shift in defense tactics, a change of mind or the fear of punishment are not adequate reasons to force the government to incur the expense, difficulty and risk of trying a defendant, who had already acknowledged his guilt before the court." 979 F.2d at 317.

III.

Under all of these circumstances, we believe that the district court's decision was within the sound exercise of its discretion. Although Mizani points out, at page 11 of his brief, that the district court did not mention the testimony of his former counsel (Mr. Sciolla) in its order and memorandum denying Mizani's motion to withdraw his guilty plea, we are confident that the district court considered Mr. Sciolla's testimony that Mizani was paralyzed by fear and incapable of understanding the ramifications of his plea. Mizani also observes that the allegations of ineffective assistance of his former counsel were withdrawn prior to the hearing, but the district court nonetheless made the finding that Mr. Sciolla's representation did not fall "below an objective standard of reasonableness." (111a-113a). Although the district court made this finding unnecessarily, the court's discussion of Mizani's reasons for moving to withdraw his plea was not entirely based on the allegations of incompetence of counsel.

Indeed, in addressing Mizani's reasons supporting the motion, the court found that Mizani's contention that he did not understand the terms of the plea agreement was not supported by the record. The court also found that although Mizani may have entered his guilty plea while under physical and emotional stress, this was not a sufficient reason to permit its withdrawal. We conclude that these findings are not clearly erroneous. Thus, the district court did not abuse its discretion in rejecting Mizani's reasons for withdrawing his plea.

IV.

For the foregoing reasons, we will affirm the judgment of the district court.

TO THE CLERK:

Please file the foregoing opinion.

/s/ Carol Los Mansmann
Circuit Judge

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

UNITED STATES OF AMERICA	**CRIMINAL ACTION**
v.	
MOHAMMED MIZANI a/k/a JOHN MARJANI	**No. 94-485-1**

ORDER & MEMORANDUM

AND NOW, this 19th day of December, 1995, upon consideration of the defendant's Motion to Withdraw Guilty Plea, the government's response thereto, and the defendant's reply, and after a hearing, it is hereby **ORDERED** that the said motion is **DENIED.**

On July 17, 1995, the day trial was scheduled to begin, the defendant and the government entered into a written guilty plea agreement, the essential terms of which were as follows:

1. The defendant agreed to plead guilty to one count of conspiracy to violate the Clean Air Act in violation of 18 U.S.C. § 371, to pay a special assessment of $50 at the time of sentencing, and to make voluntary restitution in the amount of $40,000;

2. The government promised that at the time of sentencing, it would move to dismiss the remaining counts of the indictment and would recommend that no fine be imposed (provided that the voluntary restitution had been made);

3. The government retained the right to make whatever sentencing recommendation it deemed appropriate and to comment on the

evidence and all other facts relevant to sentencing;

4. The defendant and the government entered into certain stipulations regarding the application of the United States Sentencing Guidelines; and

5. The defendant and the government agreed that "no additional promises, agreements or conditions have been entered into other than those set forth in this document, and none will be entered into unless in writing and signed by all parties."

Prior to accepting the guilty plea, the court conducted a colloquy with the defendant in open court. The court informed the defendant that it would question him under oath and that his answers might later be used against him in a prosecution for perjury or making false statements. (Tr. at 4.) The defendant acknowledged that he was aware of his right to the assistance of counsel, his right to persist in the plea of not guilty, his right to a jury trial, his right to confront and cross-examine witnesses, and his right against compelled self-incrimination. (Tr. at 6.) He told the court that he realized he would waive his right to a trial by pleading guilty. (Tr. at 8.) The defendant indicated that he understood the charges against him, the maximum possible penalty provided by law, the fact that the court would be required to consider the applicable sentencing guidelines, and the possibility that he would be required to make restitution. (Tr. at 8-10.)

The court determined that the defendant's guilty plea was voluntary and was not the result of force or threats

or of promises apart from the plea agreement. This finding was based in part on the following exchange:

> THE COURT: Has anyone threatened you or forced you to plead guilty this morning?
>
> THE DEFENDANT: No.
>
> THE COURT: You've heard the lawyers summarize the plea agreement and you've signed a plea agreement. Do you have any secret side deals of any kind with regard to your plea that have not been disclosed to me?
>
> THE DEFENDANT: No, Your Honor.

(Tr. at 12.) In addition, paragraph 9 of the plea agreement provided: "It is agreed that no additional promises, agreements or conditions have been entered into other than those set forth in this document, and none will be entered into unless in writing and signed by all parties."

The defendant now moves to withdraw his guilty plea. Federal Rule of Criminal Procedure 32(e) provides: "If a motion to withdraw a plea of guilty or nolo contendere is made before sentence is imposed, the court may permit the plea to be withdraw [sic] if the defendant shows any fair and just reason." In considering whether a defendant has demonstrated a fair and just reason for withdrawing a guilty plea, a court must consider the following factors: (1) whether the defendant asserts his innocence; (2) whether the government would be prejudiced if the plea were withdrawn; and (3) the strength of the defendant's reasons for withdrawing his plea. *United States v. Huff*, 873 F.2d 709, 712 (3d Cir. 1989). Upon application of these factors to the case at hand, the court

concludes that the defendant should not be permitted to withdraw his plea of guilty.

A. Assertion of Innocence by Defendant

The defendant claims that he is innocent of the charges against him. (Mizani Aff., at ¶ 2). At the plea colloquy held on July 17, 1995, however, he told the court he agreed with the government's summary of what he had done.[1] (Tr. at 16.)

---

[1] The government summarized the evidence it would have offered against the defendant if the case had proceeded to trial. This evidence included:

1. a tape recording of a telephone conversation between the defendant and an inspector from Air Management Services in which the defendant stated that he was not aware of any asbestos abatement activities at the Beury Building, and that no one was available to grant access to inspectors from the City of Philadelphia's Air Management Services;
2. testimony from two cooperating co-defendants, Lalit Verma and Lloyd Smith, that the defendant directed them to rent a truck and to remove bags of asbestos from the Beury Building before Air Management Services inspected the site;
3. testimony from Air Management Services inspectors regarding the extent of contamination they found at the building; and
4. testimony from Gregg Fuller, a homeless man Mizani hired in 1988 to help remove asbestos from the Beury Building.

(Tr. at 12-16.)

The defendant has not provided "sufficient reasons to explain why contradictory positions were taken before the district court and why permission should be given to withdraw the guilty plea and reclaim the right to trial." *United States v. Jones*, 979 F.2d 317, 318 (3d Cir. 1992). Almost four months elapsed between his guilty plea and his first claims of innocence. During that time, he performed several acts consistent with guilt. In accordance with the plea agreement, he contributed $40,000 to two non-profit organizations. He also pledged to donate $100,000 to a non-profit organization if he receives a sentence of probation. In light of these circumstances, his recent assertions of innocence are not credible.

B. Prejudice to Government

The government's case against the defendant is weaker than it would have been if this case had proceeded to trial on July 17, 1995. The future cooperation of co-defendants Lalit Verma and Lloyd Smith, who have already been sentenced, is uncertain. *Government of the Virgin Islands v. Berry*, 631 F.2d 214, 221 (3d Cir. 1980). Verma has recently expressed hostility to the government. Smith, a recovering crack addict, has recently had difficulty remembering the events underlying the indictment. The government is concerned about its ability to locate and produce other witnesses who are homeless, addicted to crack cocaine, or dead. The government would be prejudiced if the defendant were permitted to withdraw his plea at this point.

C. Strength of Reasons for Withdrawing Plea

The defendant argues that he should be permitted to withdraw his plea because (1) he did not understand the terms of the plea agreement; (2) he was frightened and physically and mentally exhausted; and (3) his former attorney, Guy Sciolla, was ineffective and pressured him to plead guilty.

The defendant's contention that he did not understand the terms of the plea agreement is not supported by the record. It was evident at the plea colloquy that the defendant is an intelligent man and is fluent in English. He was educated in Iran and, for three and one-half years, at Georgetown University. During the more than 30 years that he has lived in the United States, he has been involved in a number of different business ventures. He can fill out Customs forms in English.

The fact that the defendant may have entered his guilty plea while under physical and emotional stress is not a sufficient reason to permit its withdrawal. *United States v. Harris*, 44 F.3d 1206, 1210 (3d Cir. 1995). The defendant's claims that he was afraid an American jury would be biased against him because of his national origin and that he was overwhelmed by the Jencks Act material provided by the government shortly before the trial date are simply not credible. The defendant had, and continues to have, a fear of sentencing. After observing his demeanor at the plea colloquy and at the hearing on the present motion, the court finds the former testimony under oath credible and the latter an attempt to avoid an unpleasant reality.

The defendant's complaints about his former attorney, withdrawn at the hearing on the instant motion, were part of a last ditch effort to escape the consequences of his decision to plead guilty. At the plea colloquy, the defendant indicated that he had had ample opportunity to discuss the case with his attorney, expressed satisfaction with Mr. Sciolla's representation of his best interests, and said that no one had threatened or coerced him to plead guilty. (Tr. at 6, 12.) Now he claims (1) that Mr. Sciolla was not qualified or prepared to mount an adequate defense; (2) that Mr. Sciolla pressured him to plead guilty by suggesting that a jury might be biased against him because of his Iranian origin; (3) that Mr. Sciolla was ineffective because he did not interview the government's witnesses, retain an expert, or review grand jury testimony and witness statements with him.

The court finds that Mr. Sciolla's representation of the defendant did not fall "below an objective standard of reasonableness." *Strickland v. Washington*, 466 U.S. 668, 688 (1984).

Mr. Sciolla is an experienced and able trial counsel. He has practiced criminal law for more than 20 years as a prosecutor and a defense attorney. Mr. Sciolla's performance in this case was reasonable under prevailing professional norms. He filed a variety of pretrial motions, one of which resulted in the dismissal of Count IV. He was prepared to represent the defendant at trial. Mr. Sciolla thoroughly counseled the defendant as to the potential consequences of his decision to plead guilty, but did not exert any pressure on him to do so. The defendant and Mr. Sciolla knew the strengths and weaknesses of the government's case before the plea.

In sum, the court does not find a fair and just reason to allow the defendant's change of mind to justify a withdrawal of his guilty plea. "A simple shift in defense tactics, a change of mind, or the fear of punishment are not adequate reasons to force the government to incur the expense, difficulty and risk of trying a defendant who has already acknowledged his guilt before the court." *United States v. Jones*, 979 F.2d 317, 318 (3d Cir. 1992).

BY THE COURT:

/s/ Marvin Katz
MARVIN KATZ, J.